UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

RECEIVER, FRONTIER OF NORTHEAST CONNECTICUT, INC. D/B/A THE CENTER FOR OPTIMUM CARE - DANIELSON Employer [1] and NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, AFL-CIO Petitioner	Case No. 34-RC-1784

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Petitioner seeks to represent a unit composed of approximately 22 full-time and regular part-time registered nurses, case managers, MDS coordinators, charge nurses, admission discharge nurses, infection control nurses, social workers, physical therapists, occupational therapists, rehab technicians, physical therapy assistants,

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[1] The Employer's name appears as amended at the hearing.

[2] At the hearing the record was left open for the receipt of additional evidence at the time of the submission of briefs. Attached to the Petitioner's brief and hereby received into evidence as Union Ex. 4 is the "Report of the Temporary Receiver" dated October 13, 1999.

certified occupational therapy assistants, the medical records secretary and the medical records assistant employed at the Center for Optimum Care-Danielson (herein called COC-Danielson) in Danielson, Connecticut. The Petitioner currently represents a unit consisting of 210 service and maintenance employees at the COC-Danielson facility, who are covered by a collective bargaining agreement effective from February 24, 1999 to March 15, 2001.

On July 14, 1999, Frontier of Northeast Connecticut, Inc. (herein called Frontier), which up until that time had owned and operated the COC-Danielson facility as well as COC facilities in Windham and Waterford, Connecticut, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court in Massachusetts. On September 10, 1999, the trustee in bankruptcy informed the State of Connecticut's Commissioners of the Department of Public Health and the Department of Social Services that the COC facilities in Connecticut would be unable to meet their payroll obligations after September 17, 1999, which would necessitate their closing. Based upon that information, the Attorney General of the State of Connecticut, on behalf of the State's Commissioners of the Department of Public Health and the Department of Social Services, filed a petition in State Superior Court pursuant to Connecticut General Statutes Section 19a-542c and 19a-543, seeking the appointment of a receiver to insure the health, safety and welfare of the patients of such facilities. On September 15, 1999, Superior Court Judge Marshall K. Berger appointed Katharine B. Sacks, Esq., a private attorney, as the Receiver to operate the three COC facilities in Connecticut. By Order dated October 6, 1999, Judge Berger also appointed John J. Quigley, Jr., a private individual, as a Receiver of the COC facilities.

According to the terms of the Superior Court orders, the Receivers are empowered with the authority under Conn. Gen. Stat. Section 19a-545 to take "any and all actions" necessary to operate the COC facilities in a manner which will assure adequate care and treatment of the patients. Such authority, according to the orders, includes applying and collecting COC funds and profits and using them for the payment of expenses reasonably necessary for the operation of the facilities; borrowing or obtaining unsecured credit in the ordinary course of business as deemed necessary and reasonable; and expending

reasonable amounts of monies necessary for the safeguard of the facilities. In this regard, under Conn. Gen. Stat. Section 19a-545, the Receivers have the same powers as a receiver of a corporation under Conn. Gen. Stat. Section 52-507. This includes, inter alia:

> (1) The right to the possession of all the corporation's books, papers and property; (2) the power in their own names, or in the corporation's name, to commence and prosecute civil actions for and on behalf of the corporation; (3) the right to defend all actions brought against the corporation or them; (4) the right to demand and receive all evidences of debt and property belonging to the corporation, and to do and execute in the corporation's name, or in their names as receivers, all other acts and things necessary or proper in the execution of their trust; and (5) all the powers for any of the above-mentioned purposes possessed by the corporation.

The only apparent statutory limitation on the Receivers' spending authority is that any expenditure in excess of $3000 for the purpose of correcting or eliminating a deficiency in the structure or furnishings of a facility which endangers the health or safety of the residents must be approved by the court. Conn. Gen. Stat. Section 19a-545.

Since approximately September 16, 1999, Receiver Sacks has operated the COC facilities, including Danielson, pursuant to the terms of the Superior Court order. In this regard, on October 1, 1999, Receiver Sacks signed an agreement with the Union by which she assumed the collective bargaining agreement covering the service and maintenance employees at both the Danielson and Waterford facilities "for the duration of the receivership". The agreement, which apparently did not require the prior approval of the Superior Court, states, inter alia:

> The Receiver and the Union will honor all terms and conditions of the collective bargaining agreements. . . . In consideration of this agreement and in acknowledgment of the challenging financial circumstances and transitional turmoil facing these facilities, both parties commit to work together to secure a stable environment for resident care.

With regard to the actual day-to-day operation of the COC-Danielson facility since the receivership went into effect, the record reveals that its former Administrator, Judy Johnson, continues to handle such responsibilities. In addition, employee paychecks continue to be issued under the COC-Danielson name. As of the date of the hearing, 172 of 190 patient beds were occupied, and there is no evidence that patients are being moved out of the facility in anticipation of a shutdown of the facility or that the number of

employees at the facility has changed. In her "Report of the Temporary Receiver" to the Superior Court dated October 13, 1999, Receiver Sacks stated, inter alia, that

> [w]hile the receivership estate is saddled with debt, the receivership has been able to continue to provide quality patient care, thanks largely to the informed and committed local management teams of the three facilities, lead by three strong executive directors. These teams have readily recognized that the safeguarding of the residents is the receiver's priority, and have carried most of the water in ensuring that the residents' care is uninterrupted and accountable. The Department of Public Health has been a regular visitor in its concern for the residents, and its increased presence in such situations can result in more citations. There have been no citations at Waterford and Windham. Danielson has had two citations, both of which have been immediately addressed by management. The facilities continue to operate at the level that earned them accreditation by the Joint Commission for the Accreditation of Healthcare Organizations, the standard bearing accreditation body for this industry.

Neither of the Receivers nor any representative of Frontier or COC-Danielson appeared at the hearing. However, a letter addressed to the undersigned from Receiver Sacks was received into evidence regarding her position in this matter.[3] As described in more detail below, Receiver Sacks has requested that "in order to protect the interests of the employees and the yet to be identified new owner, I respectfully request that action on the Danielson petition be held in abeyance until the facility is sold."

According to Receiver Sacks, she is not the employer or owner of the Danielson facility. In this regard, she claims that this is not a corporate receivership established for financial reasons, but rather is a nursing home receivership to protect the health and safety of the nursing home residents. But for the residents, according to Ms. Sacks, Frontier would have been converted to Chapter 7 by the bankruptcy trustee and its assets liquidated. Although she acknowledges that under Connecticut law, a receiver is charged with protecting the owner's property interest, Receiver Sacks asserts that in the instant receivership, there is no owner because all of Frontier's officers and directors resigned during the bankruptcy proceedings and Frontier was stripped of all its assets. Thus, the only receivership property interests at stake are the financial resources provided by Connecticut's Department of Social Services to operate the facility. Receiver

[3] Receiver Quigley has filed no position letter or brief in this matter and presumably concurs with the position taken by Receiver Sacks.

Sacks maintains that, acting on the instructions of the Superior Court, she is attempting to remain "completely neutral and impartial relative to this matter, and not to participate in any proceedings associated with this organizing effort . . . ."

She further states that

> Judge Berger told me that it would be inappropriate for the Superior Court to negotiate with 1199 and even consider entering into a contract to establish terms and conditions of employment. The receivership is a temporary condition, and such involvement would prejudice the ability of a new owner/employer to enter into such negotiations. I am currently providing information to five serious prospective buyers, and we expect to receive offers by mid-December. We have every expectation of closing of a sale within four months, and will take all measures to accomplish this goal earlier, if possible.

Notwithstanding the foregoing, in her aforementioned report to the Superior Court dated October 13, Receiver Sacks describes numerous obstacles to the sale of the facilities, noting in conclusion that "the sales process is likely to be challenging and long".

Although not entirely clear, it appears that Receiver Sacks is asserting that the COC-Danielson facility is exempt from the jurisdiction of the Act as a political subdivision of the State of Connecticut.[4] In this regard, under the first prong of the Supreme Court's decision in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604-605 (1971), an entity will be found to be a political subdivision if it is "created directly by the state, so as to constitute a department or administrative arm of the government". Inasmuch as the Receivers are private individuals who are not employed by the State of Connecticut, they cannot satisfy the first prong of the *Hawkins* test as a public official in charge of a political subdivision of a state. See *Western Paper Products Inc. d/b/a*

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[4] There is no contention that Frontier and/or the Receivers do not satisfy the Board's statutory jurisdiction, and no evidence was proffered by either Frontier or the Receivers concerning the effect of the facilities' operations on interstate commerce. Nevertheless, the record reflects that in operating its three Connecticut facilities, Frontier annually derived gross revenues in excess of $100,000, and annually purchased and/or leased materials and services in excess of $5,000 directly from outside the State of Connecticut. Based upon the foregoing, and noting that Frontier and the Receivers have failed to cooperate in the production of evidence concerning the effect of its operations on interstate commerce, I find that Frontier's operations, as continued by the Receivers, substantially affect commerce within the meaning of the Act, and that it is therefor within the Board's statutory jurisdiction. *Tropicana Products, Inc.*, 122 NLRB 121 (1958).

Specialty Envelope Co., Samuel L. Peters, Receiver, 321 NLRB 828, 829 (1996), enfd. in rel. part, 153 F.3d 289 (6th Cir. 1998).

Under the second prong of the *Hawkins* test, an entity will be found to be a political subdivision of a state if it is "administered by individuals who are responsible to public officials or to the general electorate." In this regard, the Board will assert jurisdiction over court-appointed receivers "where the State has a temporary interest in the employing entity, for reasons unrelated to the actual services provided by that employer and unrelated to any state interest in regulating the manner in which the employer's services are provided . . . ." *Stanley E. Stein, Receiver for Holiday Inn Coliseum*, 300 NLRB 631, n. 4 (1990). Based upon the foregoing and the record as a whole, I find that the Receivers do not satisfy the second prong of the *Hawkins* test. See *Western Paper Products Inc. d/b/a Specialty Envelope Co., Samuel L. Peters, Receiver*, supra.

In reaching the conclusions described above, I note that although Receiver Sacks was appointed at the request of State authorities for reasons directly related to the actual services provided by the COC facilities, i.e., to ensure the health and safety of the facilities' residents, the record clearly reflects that the Receivers, private individuals, rather than the State of Connecticut's Department of Public Health, are solely responsible for operating the facilities. In this regard, I note that the record indicates that the Department of Public Health has issued two citations against Receiver Sacks regarding the operation of the Danielson facility, thereby indicating that it continues to maintain the same oversight responsibilities vis-a-vis COC-Danielson that it maintains over nursing homes that are not in receivership. More importantly, the Receivers clearly function in the same manner and possess the same authority and responsibilities as

those receivers over whom the Board [5] and the courts [6] have traditionally asserted jurisdiction. In this regard, the Superior Court's orders establishing the receivership, coupled with State regulations, grants the Receivers virtually unlimited authority to operate all aspects of COC-Danielson's operations and facility, including those related to labor relations. Thus, Receiver Sacks, apparently without prior approval from the Superior Court, entered into a collective bargaining agreement with the Petitioner covering almost 85% of the employees at the COC-Danielson facility. Having already entered into a collective bargaining relationship with the Petitioner, there is simply no basis for Receiver Sacks' assertion herein that it would be "inappropriate" to negotiate with the Petitioner and enter into a contract to establish terms and conditions of employment for 22 additional employees because "such involvement would prejudice the ability of a new owner/employer to enter into such negotiations."

Accordingly, I find that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of COC-Danielson.

4. A question affecting commerce exists concerning the representation of certain employees of COC-Danielson within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.[7]

5. The record reflects that certain employees in the petitioned-for unit are professional employees whose inclusion in a unit with non-professional employees is precluded by Section 9(b)(1) of the Act unless a majority of the professional

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[5] *Stanley E. Stein, Receiver for Holiday Inn Coliseum*, supra; *Western Paper Products Inc. d/b/a Specialty Envelope Co., Samuel L. Peters, Receiver*, supra. See *also Bachelder, Receiver for Houston Veneer*, 21 NLRB 907 (1940), enfd., 120 F.2d 574 (7th Cir. 1941*); Paul Stevens, Receiver for Carolina Scenic Stages,* 109 NLRB 86 (1954).

[6] See, e.g., *Ottley v. Sheepshead Nursing Home*, 784 F.2d 62, 121 LRRM 2749 (2nd Cir. 1986); *Weingarten v. Ottley*, 126 LRRM 2233 (S.D.N.Y., 1986); Cf. Greenblatt v. Ottley, 430 N.Y.S.2d 958 (1980). In these cases, the courts have specifically held that private individuals appointed as receivers of nursing homes under the New York State Public Health law may be treated as employers under the Act. See also *Rudes v. Bevona*, 155 LRRM 2318 (S.D.N.Y., 1996).

[7] In light of Receiver Sacks' report indicating that the sales process may well extend beyond the initial four-month estimate established at the outset of the receivership, the request to hold the processing of the instant petition in abeyance is hereby denied.

employees vote for inclusion, pursuant to the Board's decision in *Sonotone Corporation*, 90 NLRB 1236, 1241 (1950). Thus, I shall direct separate elections among the following voting groups of professional and non-professional employees:

> (a) All full-time and regular part-time professional employees, including registered nurses, case managers, MDS coordinators, charge nurses, admission/discharge nurses, infection control nurses, social workers, physical therapists, and occupational therapists employed at the Center for Optimum Care-Danielson, Danielson, Connecticut; but excluding all other employees, rehab technicians, physical therapy assistants, certified occupational therapy assistants, the medical records secretary, the medical records assistant, business office clerical employees, and guards and supervisors as defined in the Act.
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> (b) All full-time and regular part-time rehab technicians, physical therapy assistants, certified occupational therapy assistants, the medical records secretary and the medical records assistant employed at the Center for Optimum Care-Danielson, Danielson, Connecticut; but excluding all other employees, registered nurses, case managers, MDS coordinators, charge nurses, admission/discharge nurses, infection control nurses, social workers, physical therapists, occupational therapists, business office clerical employees, and guards, other professional employees and supervisors as defined in the Act.

The employees in voting group (a) will be asked the following questions on their ballot: (1) Do you desire to be included in the same unit as non-professional employees employed at the Center for Optimum Care-Danielson for the purpose of collective bargaining? (2) Do you desire to be represented for the purpose of collective bargaining by New England Health Care Employees Union, District 1199, AFL-CIO? If a majority of the employees in voting group (a) vote yes to the first question, indicating their desire to be included in a unit with the non-professional employees, they will be so included; and their vote on the second question will then be counted with the votes of the non-professional employees in voting group (b) to decide if they will be represented by the Petitioner for the combined bargaining unit (professional and non-professional). If, on the other hand, a majority of the employees in voting group (a) do not vote for inclusion with the non-professional employees, they will not be included with the non-professional employees and their votes on the second question will then be separately counted to decide whether they wish to be represented by the Petitioner in a separate unit.

In view of the above, my unit determination is based, in part, on the results of the professional employee vote. However, I now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees vote for inclusion in a unit with the non-professional employees, I find that the following employees will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time rehab technicians, physical therapy assistants, certified occupational therapy assistants, the medical records secretary, the medical records assistant, and professional employees, including registered nurses, case managers, MDS coordinators, charge nurses, admission/discharge nurses, infection control nurses, social workers, physical therapists, and occupational therapists employed at the Center for Optimum Care-Danielson, Danielson, Connecticut; but excluding all other employees, business office clerical employees, and guards and supervisors as defined in the Act.

2. If a majority of the professional employees do not vote for inclusion in a unit with the non-professional employees, I find the following two units to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time professional employees, including registered nurses, case managers, MDS coordinators, charge nurses, admission/discharge nurses, infection control nurses, social workers, physical therapists, and occupational therapists employed at the Center for Optimum Care-Danielson, Danielson, Connecticut; but excluding all other employees, rehab technicians, physical therapy assistants, certified occupational therapy assistants, the medical records secretary, the medical records assistant, business office clerical employees, and guards and supervisors as defined in the Act.
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> All full-time and regular part-time rehab technicians, physical therapy assistants, certified occupational therapy assistants, the medical records secretary and the medical records assistant employed at the Center for Optimum Care-Danielson, Danielson, Connecticut; but excluding all other employees, registered nurses, case managers, MDS coordinators, charge nurses, admission/discharge nurses, infection control nurses, social workers, physical therapists, occupational therapists, business office clerical employees, and guards, other professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted by the undersigned among the employees in the voting groups described above at the time and place set forth in the notices of elections to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. These eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by New England Health Care Employees Union, District 1199,
AFL-CIO.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the elections should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Elections, the Employer shall file with the undersigned, separate eligibility lists containing the *full* names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make the lists available to all parties to the elections. In order to be timely filed, such lists must be received in the Regional office, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103, on or before December 22, 1999. No extension of time to file these lists shall be granted except in extraordinary circumstances. Failure to

comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by December 29, 1999.

Dated at Hartford, Connecticut this 15th day of December, 1999.

/s/ Peter B. Hoffman
Peter B. Hoffman, Regional Director
National Labor Relations Board
Region 34

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